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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 545

LAURIE J. CARPENTER,

Petitioner,

—v.—

ERIE RAILROAD CO.,

Respondent.

PETITION FOR A REHEARING OF A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

LAURIE J. CARPENTER,
Plaintiff in person,
458 West 35th Street,
New York 1, N. Y.

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PETITION FOR A REHEARING OF A PETITION FOR CERTIORARI

To the Honorables, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Laurie J. Carpenter, respectfully submits his petition for a rehearing of a petition for a writ of certiorari to review the decree of the United States Court of Appeals for the Second Circuit in the above entitled case.

1. The brief in opposition misquotes *Reading* v. *Koons*, 271 U. S. 58 to say that a cause of action accrues on the date of the accident.

2. The present action in the Southern District No. 51-102 should be a means to modify No. 45-450 under rule 60b rather than to fix it as *res judicata*.

3. By defendant's oral argument in No. 45-450 by reason of a petition for certiorari, which was not perfected, 318 U. S. 788, any other action would have to be brought originally in this Court.

4. The Court of Appeals opinion that "all his claims have been found against him at one time or another," taken literally means that plaintiff cannot bring any claim in any court.

ARGUMENT

1. The brief in opposition said that cause of action accrues on the day of the accident, *Reading* v. *Koons*, 271 U. S. 58. That case does not use the word accident and it further says, there is no definition of the word "accrual" by means of which it may be said that a cause of action accrues at one time or another.

In *Dusek* v. *Penn R. Co.*, 68 F. 2d 131, it is actually said that cause of action does not accrue on the day of the injury. Both cases are survivor death actions.

Cited from *Carpenter* v. *Erie*, 318 U. S. 788 case of *Collier* v. *Goessling*, 160 Fed. 604, for accrual of a cause of action there must be a party in existence capable of suing or being sued and a court in which to sue.

2. The present action in the Southern District No. 51-102 should not fix No. 45-450 as *res judicata* but should be a means to modify the other judgment. In rule 60b of the code a new action has the same force to modify a judgment as a motion.

It was not expected that the first prior action in the Southern District No. L. 60, p. 20 would be held as *res judicata*, since the opinion of Judge Caffee said it applied

to the facts of the complaint. The finding there that the complaint did not state facts sufficient to constitute a cause of action and the cause of action did not accrue within the time limited implies that there was a cause of action and in view of the finding otherwise in the same proceeding, should be made void. Rule 60b does not specify a period in which a void judgment must be set aside.

The brief in opposition cites the case of *Carpenter* v. *Erie*, 132 F. 2d 362, cert. den. 318 U. S. 788. In that action the summons was tested before serving so it was not a case of limitation of a right created by statute. The appeal opinion said, "it is incumbent on a party suing under the act to allege and prove an action is within the time limited." It appears from the petition that the incumbence was fulfilled all the time in an action in the New Jersey State Court.

Respectfully submitted,

LAURIE J. CARPENTER,
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